Wong Kim Wah v The Government of The State of Pahang & Anor

HIGH COURT (KUANTAN) — CIVIL SUIT NO 479 OF 1985
MARINA YAHYA JC
12 JANUARY 2010

Contract — Breach — Plaintiff awarded subcontract by second defendant — Whether defendants in breach of their obligations under contracts — Whether there was privity of contract between plaintiff and first defendant — Whether first defendant consented to plaintiff acting as subcontractor

Contract — Assignment — Whether there was valid assignment of payments due and payable for subcontracted work

The Government of the State of Pahang ('the first defendant') executed an agreement ('the main contract)' with the Philippines National Construction Corporation ('the second defendant') whereby it awarded the latter a construction project. The second defendant then entered into a contract subcontracting a portion of the construction project work to be executed under the main contract ('the subcontract') to the plaintiff. At the same time the second defendant executed an assignment of receivables ('the assignment') whereby it assigned to the plaintiff its right to receive payments as they became due and payable for the work done as specified in the subcontract ('the subcontracted work') from the first defendant. After the execution of the subcontract and the assignment, the first defendant dealt directly with the plaintiff in relation to the work done under the subcontract and in relation to payments for the executed work. The plaintiff later claimed that it was prevented from completing the execution of the subcontracted work within the 20-month period specified in the subcontract by reason of the delays created by the first defendant. When the plaintiff was financially unable to continue with the execution of the subcontracted work it served on the defendants a notice terminating the subcontract. Thereafter the plaintiff commenced the present action against the defendants for breach of their obligations under the main contract read in conjunction with the assignment and the subcontract. It was the plaintiff's case that the defendants had consistently delayed payments due to the plaintiff and had made unwarranted deductions from monies that constituted the value of the subcontracted work, which had resulted in the plaintiff being unable to complete the subcontracted work within the specified period and suffering a total loss of RM10,512,275. The first defendant contended that the plaintiff had no right to commence the present action

against it because the plaintiff was not a party to the main contract and as such there was no privity of contract between the plaintiff and the first defendant. The second defendant submitted that as the plaintiff had commenced the present action some 22 years after the termination of the main contract, the subcontract and stopping all works, the present action against it was beyond the limitation period of six years as provided in s 6(1)(a) of the Limitation Act 1953. As such the second defendant contended that on this ground alone the plaintiff's claim against the second defendant should be dismissed in limine with costs. In response the plaintiff submitted that the first defendant was aware of the existence of the plaintiff and his capacity as sub-contractor because the first defendant had been furnished with a copy of the subcontract and the assignment and had approved and accepted the same.

Held, allowing the claim against the first defendant with interest and costs to be taxed and dismissing the claim against the second defendant with costs to be paid by the first defendant:

(1) Based on the evidence adduced it was clear that the first defendant had consented in writing to the subcontract and that payments due to the plaintiff for works done pursuant to the subcontract were to be paid by the first defendant directly to the plaintiff. The evidence also showed that the first defendant had recognised the plaintiff as a subcontractor in respect of the subcontracted work and that it had in fact paid some payments directly to the plaintiff. Thus, as far as the plaintiff was concerned the first defendant had knowledge of and had consented to the subcontract and the assignment. As such, the first defendant's submission that there was no privity of contract between the plaintiff and the first defendant would fail (see paras 18, 20–21 & 25).

(2) The plaintiff had done the work that it was sub-contracted to do and should be paid for the work done. As the second defendant had assigned all its rights under the main contract to the plaintiff, it was the first defendant who owed the money for the work done by the plaintiff and there was no evidence to say that the second defendant had to pay (see paras 27–29).

(3) Based on the assignment of receivables the plaintiff was entitled to claim damages from the first defendant. The expert evidence adduced on behalf of the plaintiff ought to be accepted as it had not been challenged or rebutted by the first defendant. The evidence of the first defendant's witness, on the other hand, was wholly unreliable and no credibility could be attached to his testimony, which was hearsay in nature. Further this witness was not an expert but more a witness of convenience. After a close scrutiny of all the evidence adduced by all the parties it was found that the plaintiff had proven his claim against the first defendant on a balance of probabilities (see paras 30–32, 35–36 & 40).

[Bahasa Malaysia summary

Kerajaan Negeri Pahang ('defendan pertama') telah memeterai satu perjanjian ('kontrak utama') dengan Philippines National Construction Corporation ('defendan kedua') di mana ia telah mengawardkan defendan kedua dengan projek pembangunan. Defendan kedua kemudiannya memasuki sebuak kontrak yang mengsubkontrakan sebahagian projek pembangunan yang akan dijalankan di bawah kontrak utama ('subkontrak tersebut') kepada plaintif. Pada masa yang sama, defendan kedua telah memeterai penyerahakkan terima ('penyerahakkan tersebut') yang mana ia menyerahakkan kepada plaintif haknya untuk menerima bayaran kerana ia menjadi tertunggak dan perlu dibayar bagi kerja yang dijalankan seperti yang dinyatakan dalam subkontrak ('kerja subkontrak') daripada defendan pertama. Selepas subkontrak dan penyerahakkan dimeterai, defendan pertama berurusan secara langsung dengan plaintif berkenaan pelaksanaan kerja yang dijalankan di bawah subkontrak dan berkenaan pembayaran bagi kerja yang telah siap. Plaintif kemudiannya mendakwa bahawa dia terhalang daripada menyempurnakan pelaksanaan kerja-kerja subkontrak dalam tempoh 20 bulan yang dinyatakan dalam subkontrak atas alasan kelewatan defendan pertama. Apabila plaintif tidak mampu untuk menyambung pelaksanaan kerja subkontrak, ia menyampaikan satu notis kepada defendan-defendan untuk menamatkan subkontrak. Dengan itu, plaintif memulakan tindakan ini terhadap defendan-defendan bagi pelanggaran tanggungjawab-tanggungjawab di bawah kontrak utama yang dibaca bersama penyerahakkan dan subkontrak tersebut. Adalah menjadi kes plaintif bahawa defendan-defendan telah secara konsisten melewatkan pembayaran tertunggak kepada plaintif dan membuat penolakan tidak wajar daripada wang yang membentuk nilai kerja subkontrak, yang menyebabkan plaintif plaintif tidak boleh melaksanakan kerja subkontrak dalam tempoh yang ditetapkan dan mengalami kehilangan sebanyak RM10,512,275. Defendan pertama menghujahkan bahawa plaintif tiada hak untuk memulakan tindakan ini terhadapnya kerana plaintif bukanlah pihak dalam kontrak utama dan dengan demikian, tiada priviti kontrak antara plaintif dan defendan pertama. Defendan kedua menghujahkan bahawa memandangkan plaintif telah memulakan tindakan 22 tahun selepas penamatan kontrak utama, subkontrak dan penghentian semua kerja, tindakan ini adalah melebihi tempoh had masa yang diperuntukkan dalam s 6(1)(a) Akta Had Masa 1953. Oleh itu, defendan kedua menghujahkan dengan alasan ini sahaja, tuntutan plaintif terhadap defendan kedua sepatutnya ditolak dengan kos. Sebagai balasan, plaintif menghujahkan bahawa defendan kedua sedar kewujudan plaintif dan kapasitinya sebagai subkontraktor kerana defendan pertama telah diberikan dengan sesalinan subkontrak dan penyerahakkan dan telah pun meluluskan dan menerimanya.

Diputuskan, membenarkan tuntutan defendan pertama dengan faedah dan kos untuk ditetapkan dan menolak tuntutan terhadap defendan kedua dengan kos ditanggung defendan:

(1) Berdasarkan bukti yang dikemukakan, jelas bahawa defendan pertama

telah memberi keizinan bertulis berkenaan subkontrak dan pembayaran tertunggak kepada plaintif bagi kerja-kerja yang dilaksanakan berikutan subkontrak yang harus dibayar oleh defendan pertama secara langsung kepada plaintif. Bukti juga menunjukkan bahawa defendan pertama telah mengiktiraf plaintif sebagai subkontraktor bagi kerja yang disubkontrakkan dan ia sebenarnya telah membuat beberapa pembayaran secara langsung kepada plaintif. Dengan itu, berkenaan plaintif, defendan mempunyai pengetahuan dan memberi keizinan bagi subkontrak dan penyerahakkan. Oleh itu, hujahan defendan pertama bahawa tiada priviti kontrak antara plaintif dengan defendan pertama akan gagal (lihat perenggan 18, 20–21 & 25).

(2) Plaintif telah melaksanakan kerja yang disubkontrakkan dan sepatutnya dibayar bagi kerja yang dilaksanakan. Oleh kerana defendan kedua telah menyerahakkan semua haknya di bawah kontrak utama kepada plaintif, defendan pertama yang sebenarnya berhutang wang bagi kerja yang dilaksanakan oleh plaintif dan tiada bukti yang menyatakan defendan kedua perlu membayarnya (lihat perenggan 27–29).

(3) Berdasarkan penyerahakkan terima, plaintif berhak untuk menuntut ganti rugi daripada defendan pertama. Keterangan pakar yang dikemukakan bagi pihak plaintif harus diterima kerana ia tidak dicabar atau disangkal oleh defendan pertama. Bukti saksi defendan pertama, sebaliknya, tidak boleh dipercayai sama sekali dan tiada kredibiliti yang boleh dikaitkan dengan keterangannya, yang bersifat dengar cakap. Tambahan lagi, saksi ini bukan pakar tetapi cuma saksi keadaan. Selepas penelitian semua bukti yang dikemukakan oleh pihak-pihak, didapati bahawa plaintif telah membuktikan tuntutannya terhadap defendan pertama atas imbangan kebarangkalian (lihat perenggan 30–32, 35–36 & 40).]

Notes

For cases on assignment in general, see 3(2) Mallal's Digest (4th Ed, 2010 Reissue) paras 2504–2552.

For cases on breach in general, see 3(2) Mallal's Digest (4th Ed, 2010 Reissue) paras 2566–2823.

Cases referred to

Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761, FC (refd)

Malayawata Steel Bhd v Government of Malaysia & Anor [1980] 2 MLJ 103, PC (refd)

William Bernard's Sons & Co v Dunlop Rubber Company [1905] AC 454 (refd)

Legislation referred to

Limitation Act 1953 s 6(1)(a)

Shahul Hameed Amirudin (Zul Rafique & Partners) for the plaintiff.
Mat Zaraai bin Alias (Pahang State Legal Advisor) for the first defendant.
Vignesh Kumar (Balendran Chong & Bodi) for the second defendant.

Marina Yahya JC:

THE BACKGROUND FACTS

[1] On or about the 21 February 1980, the first defendant awarded to the second defendant a contract to construct, complete and maintain certain work in the project. Consequent there upon the first defendant and the second defendant executed an agreement dated 9 June 1980 ('main contract').

[2] Subsequent thereto, the second defendant by an agreement dated 17 August 1982 ('subcontract'), subcontracted to the plaintiff to construct, complete and maintain, a portion of the works required to be executed under the main contract (subcontracted works). The subcontracted works are particularised in the subcontract.

[3] Arising out of the subcontract, the second defendant and the plaintiff executed an assignment of receivables which is also dated the 17 August 1982. By the assignment, the second defendant assigned to the plaintiff the second defendant's right under the main contract to receive from the first defendant all payments and when they should become due and payable with references subcontract works, amounting approximately to RM7,939,313.25. The said amount was only provisional and was subject to re-measurement and to such variations as might be made to the subcontract works pursuant to the provisions of the main contract.

[4] The first defendant approved, consented to or acquiesced in the assignment of receivables and thereby expressly or by necessary implication approved, consented to acquiesce in the subcontract in the terms of assignment of receivables. Thereafter after the execution of the sub-contract and of the assignment of receivables, the first defendant by its servants or agents, dealt directly with the plaintiff in relation to subcontracted works and in relation to payments for executed works.

[5] It was expressly provided or necessary implied in the assignment of receivables that the amounts payable to the plaintiff in respect of such of the sub-contracted works as the plaintiff shall have executed and as valued in the certificates of progress payments, would be paid the plaintiff free of all deductions or abetments that have been authorise and agreed upon by or between the first and second defendant.

[6] The plaintiff commenced carrying out the subcontracted works soon after the subcontract and the assignment of receivables were executed, and in the course of carrying out the said works the plaintiff also carried out such variation works as were ordered by the first defendant, its servant, agents and by circumstances beyond the plaintiff control.

[7] The plaintiff was prevented from completing the execution of subcontracted works in the 20 months period specified in the subcontract by reason of delays created by the first defendant, its servant or agent and circumstances beyond the plaintiffs control. Reason of delays created by the first defendant are as follows:

(a) Delays to Road Works
    (a) Possession of site
    (b) Setting out
    (c) Supply of corrugated metal pipes
    (d) Design changes
    (e) Excavation run to spoil
    (f) Ripping of hard material
    (g) Insurance policy dispute
    (h) Revision of culvert levels
    (i) Adverse weather/exceptional monsoon conditions
    (j) Delays caused to the progress of earthworks for Road B2 & B3.

(b) Delays to Bridgeworks
    (a) Drawings
    (b) Possession of site
    (c) Additional soils investigation
    (d) Changes in pile types
    (e) Change in location — Bridge 5
    (f) Level changes of soffit to Bridges 2, 3,4, 5 & 6
    (g) Pre stressed bridges beams
    (h) Insurance policy dispute — Bridge 17
    (i) Concrete test cube — Bridge 16
    (j) Aggregated Delay

[8] In addition to the constructional delays set out in paras 7 (i) & (ii) hereof, the first defendant and/or the second defendant were in breach of their

obligations under the main contract (read in conjunction with the assignment of receivables) and the subcontract respectively by consistently delaying payments due to the plaintiff for the subcontracted works executed and by making unwarranted deductions from monies constituting the value of the sub-contracted works. The amount due is RM3,132,520.

[9] In spite of the said breaches and of the fact that it had not been paid on the value of the subcontracted works assessed from progress payment certification number 37, the plaintiff for the purpose of fulfilling its contractual obligations, continued to execute the subcontracted works until 27 of October, 1984.

[10] On 27 October 1984, the plaintiff by reason of the inability financially to continue with the execution of the sub-contracted works, served on the first defendant a notice terminating the sub-contract forthwith.

It is said that by reasons of the first defendant's breaches, the plaintiff has suffered loss and damage. Particular of losses suffered by the plaintiff are as follows:

(a) standby charges due to delay RM4,896,031;

(b) miscellaneous contractual claims — RM663,847;

(c) outstanding payments for measured works and escalation costs is withdrawn;

(d) unwarranted deduction — RM3,132,520; and

(e) financing costs — RM1,819,877.

Total loss suffered by the plaintiff is RM10,512,275.

[11] From the pleadings I find that there are several issues to be determined by this court. The issues are as follows:

(a) what is the nexus and relationship between the parties;

(b) is there a relationship between plaintiff and first defendant, and if so, what is the nature of the relationship between them;

(c) did plaintiff suffer damages and if so can the plaintiff claim against the first defendant; and

(d) in all circumstances what are plaintiffs remedies?

[12] The parties have submitted several documents which were marked as exhs 103A–K. On behalf of the plaintiff as well as for the first defendant, three witnesses each respectively testified on their respective behalf and on behalf of

the second defendant, one witness testified. They are:

(a) PW1 — Wong Kim Wah, the plaintiff

(b) PW2 — David L Winterbottom

(c) PW3 — AldrinWong

(d) DW1 — Ang Jesus ('second defendant witness')

(e) DW2 — Embong bin Said ('first defendant witness')

(f) DW3 — Johari bin Abdullah ('first defendant witness')

(g) DW4 — Abdul Ghafar bin Yaacob ('first defendant witness')

[13] The plaintiff contends that notwithstanding the assignment of receivables and the consent of the first defendant thereto the second defendant was and/or is liable to the plaintiff for all payments the subcontracted works done of the plaintiff for and on behalf of the second defendant as the main contractor.

[14] The first defendant contends that the plaintiff is not a party to the main contract ('encl 103A') and therefore the plaintiff has no privity to sue the first defendant. The defendant averred that plaintiff was only a mere agent of the second defendant and the only right that the plaintiff has is to sue the first defendant over the subcontract agreement entered between them in which the first defendant was never a party to the subcontract agreement.

[15] The second defendant claims that the plaintiff has commenced the action against them after some 22 years later upon termination of the main contract, subcontract and stopping all works. This clearly shows that it is beyond the limitation period of six years as provided in s 6(1)(a) of the Limitation Act 1953 and on this ground alone the plaintiff's claim against the second defendant should be dismissed in limine with costs.

[16] It is not disputed that the plaintiff and the second defendant have executed an assignment of receivables and a subcontract agreement both dated 17 August 1982 (refer to 103C pp 600–622).

[17] The first defendant has also consented to both the said agreements. By letter dated 28 August 1982 (refer to 103C p 599) the first defendant has stated that they have no objection to a partial assignment of the contract to the plaintiff and the first defendant has also executed the consent to the assignment. I hereby reproduced the contents of the said letter dated 28 August 1982 where it states as follows: (p 599 103C)

Pejabat Pengarah Kerja Raya

Negeri Pahang

Kuantan.

28hb Ogos, 1982

C.D.C.P

Room 802, Bangunan Yayasan Selangor

Jalan Bukit Bintang

Kuala Lumpur.

Tuan,

Rural Roads Pahang - Contract Package 13

Contract No: S/PHG/114/80

assignment of receivables

With reference to your letter F500/0304/82-EXT and the assignment of receivables dated 17/8/1982, JKR Pahang has no objection to your proposal if partial assignment of the above contract to Svankat Binarava. No. 12A, Jalan Telawi. Bangsar Baru. Kuala Lumpur.

Please execute the assignment of receivables in the form which is legally acceptable.

This is also in compliance with clause 3 of the Contract (refer 103A page 28).

Clause 3:

The contractor shall not assigned the contract or any part there of or any benefit or interest there in or there under (otherwise then by a charge in favour of the contractor's Bankers of any monies due or to become due under this contract) *without the prior written consent of the employer.*

[18] I shall now refer to the assignment of receivables at pp 600–608 103C where the second defendant assigns in assignment the right to receive directly from the Pahang Government all payments as and where they become due and payable by the Pahang Government to second defendant under the provisions of the main contract with reference to the aforesaid subcontract works from time to time to the extend of RM7,939,315.25 which sum is only provisional and subject to variations as provided for in the main contract.

I therefore again refer to subcontract agreement between plaintiff and second defendant where the plaintiff agrees to undertake by way of subcontract, the full completion of Road B/2 — Jalan Sungai Koyan — Sungai Ular, Road B/3 — Jalan Sungai Koyan — Tanjung Gahai, bridge No 2,3,4,5,6,12,13,14,15,16 & 17 particulars of which are set out in third schedule referred to 'the subcontract works' in accordance with the instructions to tenderer form of

tender, form of agreement, form of bond and bank guarantee, conditions of contract, specifications, appendixes, bill of quantities and schedule of particulars of the main contract which represents and warrants that plaintiff could execute the works strictly in accordance with the requirement of the main contract.

[19] A copy of the assignment of receivables had been furnished to the first defendant for their approvals and the same had been approved and accepted by the first defendant without any protest. An examination of these documents will clearly establish that at all material time first defendant was more than aware of the existence of plaintiff and his capacity as a subcontractor in respect of part of the project in question.

[20] DW1 in his evidence confirmed that after the execution of the subcontract and the assignment of receivables the second defendant was not involved in this performance of any of the works. Parties had agreed that payments due for works done pursuant to the subcontract were to be paid by the first defendant directly to the plaintiff. The evidence shows that in fact the first defendant has paid some payments directly to the plaintiff. This was also admitted by DW2 that these payments were made directly because of the assignment of receivables. The first defendant now claimed that they have nothing to do neither the plaintiff nor the second defendant on the assignment of receivables or the subcontract. The simple word that I can say here is that the plaintiff has no privity with the first defendant at all as in the assignment or the main contract. I totally disagree with the first defendant argument as in fact evidence shows otherwise which I shall deal with later.

[21] I shall now discuss the status of the effect of assignment of receivables entered between the plaintiff and the second defendant and with the consent of the first defendant. The issue of privity of contract has already been dealt with by Her Ladyship Datuk Heliliah bt Mohd Yusof J (as she then was) in her grounds of judgement dated 23 April 2002 in which she was of the views that the assignment of receivables was an equitable assignment.

THE LAW ON ASSIGNMENT

[22] The law on equitable assignment is set out in *Halsbury's Laws of England* Vol 14, (3rd Ed) from 574. As regards choses in action Halsbury has this to say at para 1068:

> To constitute an equitable an assignment of a chose in action no particulars form of words is required; an engagement or direction by a debtor to pay out of a specified debt or fund constitutes an equitable assignment, though it does not operate as an assignment of the whole fund or debt. A mere charge on a fund or debt operates as a partial equitable assignment. Notice to the person owing the debt, or the holder of

the fund, is not necessary to complete the title of the assignee; but if he omits to give such notice, a subsequent assignee who took without notice of the 1st charge, may by giving notice, obtain priority over him. There are 3 main ingredients of equitable assignment i.e an adequate mode, clear intention and intimation to either debtor or assignee.

[23] Assignment, equitable has legally and judicially defined as assignment giving to the assignee a right enforceable only in equity. An equitable assignment (of debt) does not always take the form of regular assignment. It maybe couched in the language of command. It maybe a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice he does so at his peril. If the assignment be for valuable consideration, and communicated to the third person it cannot be revoked by the creditor or safety disregarded by the debtor (see judgement by Lord Macnagten in *William Bernard's Sons & Co v Dunlop Rubber Company* [1905] AC at 462.) Her Ladyship Datuk Heliliah Bt Mohd Yusof in her grounds of judgement has cited case of *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761 (FC) His Lordship Pen Swee Chin said this at p 775:

In any event, compliance with s 4(3) is not a prerequisite to the validity of an assignment, which is to be determined in the usual ways. Even without complying with s 4(3), eg even without notice of the assignment to such debtors, for the sake of arguments, the assignment would have been valid in equity in any event against the assignor.

[24] The law is settled on assignment whether the assignment in question is an absolute or an equitable assignment. Both of these assignments are enforceable in law.

Counsel for the plaintiff has referred judgment by Lord Russell of Killowen in *Malayawata Steel Bhd v Government of Malaysia & Anor* [1980] 2 MLJ 103 at 108 column C left and it was held:

at p 108:

In Their Lordships opinion accordingly there was here a valid equitable assignment of progress payments due to NKH by MSB in so far as payment for the relevant steel was due and outstanding;

at p 103,

There was here a valid equitable assignment of progress payment due to the construction company in so far as payments for the relevant steel supplied was due and outstanding and therefore judgement should be entered against the respondent government for the amount claimed.

[25] I refer the evidence of DW2 on this issue. DW2 has said as follows:

(a) in examination in chief — he said he had no knowledge of the sub-contract between second defendant and plaintiff. But in re-examination that is not so, when he admitted that the first defendant consented to the assignment of receivables and he had knowledge of direct payment to plaintiff by first defendant;

(b) DW2 admitted he was aware that the plaintiff carried out works involving the road and bridge for the benefit of the first defendant and for this, the first defendant had to make direct payment to the plaintiff as stated in the assignment of receivable (Q25 p 479 NE);

(c) DW2 then said that there was a relationship between the plaintiff and first defendant (Q224 at p 550 NE) obviously it came from the assignment of receivables;

(d) DW2 said such assignment of receivables did not binding on the first defendant but then disclosed that he was aware that the High Court has held that there was an assignment of contractual rights in favour of the plaintiff (Q19 at p 477 NE). He then admitted there was a relationship between the plaintiff and the first defendant (Q221 & 224 at pp 549 & 550 NE);

(e) DW2 also said the first defendant had no involvement in subcontract but in later in re-examination he admitted that he had represented the first defendant during a negotiation with the plaintiff at Istana Hotel (Q 26 & 27 at p 561 NE). If there was no relationship, why did the first defendant meet with the plaintiff? DW2 also admitted having knowledge of the plaintiffs claim (Q30 & 31 at p 562 NE);

(f) DW2 said that the first defendant regarded plaintiff as worker and agent for second defendant. In cross-examination DW2 agreed that the plaintiff was regarded by the first defendant as nominated subcontractor (Q 22 at p 549 NE). With this evidence first defendant submission on plaintiff as a mere agent to the second defendant could not stand.

[26] Based on DW2 evidence as above, I would come to a conclusion that submission by the first defendant's counsel that since there is no privity of contract between the plaintiff and the first defendant then plaintiff ought to have taken action against the second defendant who may then take an action against the first defendant would failed.

As far as the plaintiff is concerned, by reason of the assignment and assignment of receivables, of which the first defendant had at all material times not only knew of, but had also consented to it, to contend now as it does, is prima facie devoid of any merit. Further, it no longer is relevant either in law or in fact as

all parties in any event are now before the court, and it is trite law and now well settled that the is no difference between an absolute assignment and an equitable assignment.

[27] Documentary evidence shows that the first defendant dealt directly with the plaintiff because of the assignment of receivables and not denied by the first defendant. Those documents can be seen in bundle 103I and 103H. The first defendant also did not deny that the second defendant was no longer in Malaysia after the assignment was signed. DW1 in his evidence has said that from his understanding the plaintiff only sued the first defendant because the first defendant has agreed to pay all payments due directly to plaintiff pursuant to the assignment of receivables and therefore there is no basis for plaintiff to sue the second defendant now (Q 10 at pp 17 & 18 NE Vol 1). The plaintiff has done the works and he should be paid for the works done.

[28] Counsel for the plaintiff submitted that it was never their intention from the beginning looking payment from the second defendant. It is the first defendant who owe the money for the work done by the plaintiff. If there is any issue then it is between the first defendant and second defendant to resolve it.

[29] The second defendant has assigned all his rights under the main contract to the plaintiff through assignment of receivables. Thereafter the second defendant no longer involved in any works. The plaintiff took all instructions from the first defendant. There were correspondence and meetings between the plaintiff and the second defendant. It is not disputed that the work has been done and somebody has to pay for it and there is no evidence to say that the second defendant has to pay.

DAMAGES

[30] Can the plaintiff claim damages from first defendant? The answer is 'yes' because of the assignment of receivables.

[31] Counsels for the plaintiff submitted that plaintiff has established his case and the first defendant has not discharged the burden of proof cast on them. PW3 is a chartered loss adjuster, a lawyer and a professional engineer who gave evidence based on professional duty. His expert evidence adduced on behalf of plaintiff ought to be accepted as it has not been challenged and rebutted by first defendant at all.

[32] PW3 testified in his evidence that the late Kent James prepared the claim together with his assistance. PW3 relied entirely on the documents

before the court and supported each and every one of his entries with supporting evidence. PW3 also relied on the site records and for each of his averment he gave corroborative documentary evidence to support. Despite being subject to 1,177 questions, PW3 remain unshaken and his evidence stands high speaks volume in support of the plaintiff's claim.

[33] The first defendant on the contrary said that the basis of PW3 quantification and the evidence pertaining to the claim could not be relied upon on the ground that he has no personal knowledge on the actual transaction and only giving his assumption and opinion on the claim.

[34] As for the first defendant, DW2 evidence is so wanting and yet does not inspire confidence of any nature whatsoever and no weight can be attached to his testimony at all. DW2 evidence is evidence of convenience without any proper basis. Evidence shows that:

(a) DW2 admits that he was not involved in any way with this contract in question. He first came to know about the claim only in 1995;

(b) DW2 admits that he has no personal knowledge as to how the contract was performed by the plaintiff;

(c) DW2 claimed that he has the experience in assessing damages but never disclosed what experience that he has compared to PW3;

(d) DW2 only get involved in this case in 1997 when he was asked by Tuan Bazain to assist him in supplying documents relating to the claim. He also admitted that he never retained the records;

(e) my observation on DW2 evidence is that he could answer every question in examination in chief and re examination but under cross examination all his answers invariably were spiced with 'I am not sure', 'Tidak pasti', 'can't remember' or 'cannot confirm' or 'I am unable to answer';

(f) DW2 could not confirm number of machinery and equipment recorded at the site (43 no) exceed the number of machinery and equipment claimed by the plaintiff (13 no). The site diaries did not record the idling machinery and plant at the site especially those at the storage yards and consequently evidence to the contrary is but a bare opinion formed admittedly on an incomplete decument. DW2 too does not have all the documentary evidence and most of iot either lost or misplaced. As such he could not answer some of the questions;

(g) DW2 gave a conflicting evidence on the issue of delay to the work as well as reasons for suspension by first defendant due to insurance dispute;

(h) he agreed that cl 44(b) 103A p 55 addressed delays due to exceptional inclement weather (Q58@490) but then said the conditions of contract did not address exceptional inclement weather. (Q 72@571 & Q 181@595)

(i) DW2 said that there was a requirement by the first defendant that the plaintiff must employed a licensed surveyor when measuring the hard material. He also admitted that first defendant did not require the plaintiff to engange a license surveyor to carry out the measurement of the hard material (Q 76@495). He too admitted that he was not sure about what the dispute was all about and later says that the dispute is due to the method of measuring the hard material. To me he was either giving his opinion or giving hearsay evidence.

(j) He agreed that he was wrong when giving evidence about the location of the bridges (Q88@499 and 92@502). In such a case DW2 did not even know the location of the bridges.

[35] In evaluating DW2 evidence, it is crystal clear that his entire testimony is wholly unreliable and no credibility can be attached to his testimony and more so DW2 is not an expert and again I would say that he is a witness of convenience and his evidence is hearsay. Any opinion expressed by him was purely an assumption without any basis and such opinion and evidence are inadmissible.

[36] Counsel for the first defendant in his submission submits that evidence of DW3 and DW4 have not been challenged by the plaintiff. Well this is not so. DW3 was a site clerk who recorded the machinery and equipment and the work that was carried out. He admitted under cross-examination that he checked the storage yards where the machinery and equipment were kept when they were not in use. He further confirmed that in early December 1983 to February 1984 there was exceptional rainfall which prevented any work from being carried out at site. He then later in re-examination confirmed that he did not include the number of machinery and equipment that were at the storage yards. DW4 testified that he recorded all the plant and equipment at the site and was told that the site diary only commenced in January 1983. He was not sure whether the machinery and equipment were working. With his evidence, I cannot see whether he is able to comment on the machinery and equipment listed in 103F at p 241.

[37] PW1 confirmed that the plaintiff never take any plant advance because plant advance was paid to second defendant long before plaintiff entered into the picture. PW1 also testified after inspections, the progress payment was sent

to the head office for a senior engineer to prepare the payment. After that it is sent to the treasury where payment is made direct to plaintiff free of encumbrance and no deduction made until later stage. The assignment of receivables of which the first defendant had notice and consented specifically provided otherwise. The absence of such deductions by first defendant in the earlier stages of the contract clearly establishes this.

[38] PW3 in his evidence produced a copy of the bank statement from plaintiff's bank which showed that plaintiff was levied an interest of 15.74% and testified that the basis for him to compute the interest at 14.5% was on prevailing overdraft interest rate charged by the bank was 15.74% but he was recommending 14.5%. PW3 was not cross-examined on this. There was evidence before this honourable court that plaintiff had availed overdraft facilities from a commercial bank, which had levied an interest rate in excess of 15%. The unrebutted and unchallenged evidence before this court is that he has borrowed money from a bank, which has imposed an interest rate on him which he has to pay. In such circumstances, plaintiff submits that interest suggested by first defendant which is 4% is unreasonable and has no basis. I am of the view that the interest either 15%, 14% or 14.5% is only address on the commercial bank rate charged to the borrower and as for this case it was never a contractual interest that agreed upon by parties.

CONCLUSION

[39] After having scrutinised and considered the whole evidence of the plaintiffs' and the defendant's witnesses together with voluminous of documents and on the balance of probabilities, I find that the plaintiff has placed such credible evidence and has proved his claim against the first defendant. I therefore allowed the plaintiff's claim as re amended statement of claim in prayer 19 as agreed upon by parties on 6 July 2009 which is as follows:

(a) standby charges due to delay — RM4,896,031;

(b) miscellaneous contractual claims — RM 663,847;

(c) unwarranted deductions — RM3,132,520; and

(d) Financing costs — RM1,819,877.

Total — RM10,512,275

[40] Interest at the rate of 8%pa from the date of filing of the writ till satisfaction and costs of this action to be taxed.

[41] There was no single evidence against the second defendant from the plaintiff and first defendant. Therefore the claim against second defendant is dismissed with costs and costs to be paid by the first defendant.

Claim against first defendant allowed with interest and costs to be taxed and claim against second defendant dismissed with costs to be paid by the first defendant.

Reported by Kohila Nesan